IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-701

MARVIN MELTZER, et al,
Petitioners,

versus

BOARD OF PUBLIC INSTRUCTION OF
ORANGE COUNTY, FLORIDA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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AUTHORITIES

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THE RESPONDENTS RESPECTFULLY PRAY THAT THE PETITION FOR A WRIT OF CERTIORARI, FILED HEREIN BY THE PETITIONERS, BE DENIED BY THIS COURT.

INTRODUCTORY STATEMENT

THE RESPONDENTS ARE NOT INCLUDING AN APPENDIX IN THIS BRIEF. THE APPENDIX TO THE

PETITIONERS' PETITION HEREIN IS DEEMED SUFFICIENT, AND EACH REFERENCE HEREIN TO AN APPENDIX WILL BE A REFERENCE TO PETITIONERS' SAID APPENDIX.

OPINIONS BELOW

The Respondents accept the Petitioners' version of OPINIONS BELOW as stated and set forth in the Petitioners' Petition herein.

JURISDICTION

The Respondents accept the Petitioners' version of JURISDICTION as stated and set forth in the Petitioners' Petition herein.

QUESTIONS PRESENTED

The Respondents disagree with and do not accept the Petitioners' version of QUESTIONS PRESENTED as stated and set forth in the Petitioners' Petition herein. The Respondents submit that the questions presented are as follows:

I. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE DISTRICT COURT'S HOLDING THAT INJUNCTIVE RELIEF WAS NOT WARRANTED WITH RESPECT TO THE GUIDELINES PROMULGATED BY RESPONDENTS WHICH GOVERN THE DISSEMINATION OF RELIGIOUS MATERIALS?

II. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE DISTRICT COURT'S HOLDING THAT DECLARATORY JUDGMENT RELIEF WAS NOT WARRANTED WITH RESPECT TO THE "CHRISTIAN VIRTUE" STATUTE?

III. ARE THE ISSUES HEREIN IMPORTANT ENOUGH TO WARRANT THIS COURT'S ATTENTION?

IV. IS IT UNLIKELY ON THIS RECORD THAT THIS COURT COULD REACH ANY CONSTITUTIONAL ISSUE?

STATUTORY PROVISIONS INVOLVED

The Respondents accept the Petitioners' version of STATUTORY PROVISIONS INVOLVED as stated and set forth in the Petitioners' Petition herein.

STATEMENT OF THE CASE

This case was initiated by the filing of a Complaint on October 16, 1970, in the United States District Court for the Middle District of Florida. It was an action brought by some thirty-nine (39) parents of children

attending the public schools of Orange County, Florida, against The Board of Public Instruction of Orange County, Florida (hereinafter called "The School Board") and the Superintendent of Public Instruction. The parents were complaining that The School Board was violating the anti-establishment clause of the First Amendment of the United States Constitution by providing for and requiring daily opening exercises in the schools which constituted a religious observance, improperly participating in or allowing the distribution of Gideon Bibles to students on school property, and by promulgating guidelines which would establish a location at each school where all faiths could leave religious materials which could be picked up by anyone desiring the same. Additionally, the parents complained about Florida Statutes, § 231.09(2), which provides that members of the Instructional Staff of the Public School System shall

> ". . . . . embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patroitism and the practice of every Christian virtue."

After a number of hearings before the District Court, the entry of several Orders and Judgments by the District Court, and an earlier appeal to the Circuit Court, the District Court in an Opinion filed January 22, 1975 made the following findings and rulings:

1. That the Respondents had not engaged in any devotional-type activities for the past four years (App. C, p. 13a).

2. That there had been no Bible distribution in the Respondents' school system in more than four years, and that there was no indication that such a practice would be resumed (App. C, p. 14a).

3. That there was no evidence showing a present or likelihood of future enforcement of the "Christian virtue" statute adverse to the position of the Petitioners, that the Petitioners' concern over the statute's infringement on First Amendment rights was imaginary or speculative, and that the case did not present a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment (App. C, p. 18a), and that the Court, therefore, had no jurisdiction to hear the statutory attack (App. C, p. 19a).

4. That in this case the type of neutrality, referred to by Chief Justice Burger in *Waltz v. Tax Commission of the City of New York*, 397 U.S. 644, 25 L.Ed. 2d 697 (1970), had been obtained in the Respondents' school system as to all issues raised in the case, and that no further action by the District Court was required (App. C, p. 21a).

5. That, in summary, the Respondents were not engaging in the acts complained of — that there was no imminent threat of future violation so that an injunction was not necessary and declaratory relief is not appropriate where no genuine case or controversy exists (App. C, p. 22a).

The District Court entered a Judgment, along with said Opinion, dismissing the case (App. C, pp. 22a-23a).

An appeal from the District Court's Opinion and Judgment of January 22, 1975 resulted ultimately in a Rehearing en banc before the full Fifth Circuit Court of Appeals. By what appears to be a 9 to 5 majority (although the Per Curiam Opinion refers to an "equally-divided vote"), the Circuit Court of Appeals affirmed the District Court's holding as to the Respondents' promulgation of guidelines for the distribution of religious literature at designated locations on school premises, and by an equally-divided vote affirmed the District Court's holding relative to the "Christian Virtue" statute (App. F, pp. 74a-75a).

REASONS FOR DENYING THE WRIT

The action by the Court of Appeals in affirming the decision of the District Court was correct. Furthermore, the decision of the Court of Appeals was not decided in conflict with the applicable decisions of this Court, and the Petitioners have not exhibited sufficient

reasons which should result in this Court invoking its discretionary jurisdiction.

The Court of Appeals decided the issues before it properly and without conflict with relevant decisions of this Court. The Petitioners have set forth in their Petition two issues for review by this Court. However, the Respondent, as hereinafter stated, views the decisions below to be determinative only of whether Petitioners were entitled to injunctive relief as to the guidelines for distribution of religious materials, and of whether Petitioners were entitled to declaratory relief in respect to Section 231.09 (2), Florida Statutes. Accordingly, the decision of the District Court, which was affirmed by the Circuit Court of Appeals en banc, as to those issues was correct and not in conflict with decisions of this Court. Therefore, intervention by this Court is neither required nor desirable.

I. The Court Of Appeals Correctly Affirmed The District Court's Holding That Injunctive Relief Was Not Warranted With Respect To The Guidelines Promulgated By Respondents Which Govern The Dissemination Of Religious Literature.

The decision of the District Court below, which was affirmed by the Court of Appeals, was that the Petitioners were not entitled to injunctive relief in connection with the guidelines for dissemination of religious literature promulgated and adopted by the Respondents.

Relative to the complained of Bible distribution, the District Court found that prior to December 4, 1970, the Petitioners had permitted the distribution of some 48,000 Gideon Bibles to pupils in the classroom or otherwise on school grounds (App. C, p. 14a), a portion of the distribution having occurred after promulgation of the guidelines. In addition, the District Court found that there had been no Bible distribution in the Petitioners' school system since December 4, 1970, or any indication that such distributions would occur in the future. (App. C, p. 14a).

The District Court, after describing the types of activities relative to Bible distribution and other complained of acts of the Petitioners which were unconstitutionally carried on prior to December 4, 1970, found that

> ". . . the defendants have not for the past four years and are not now violating the decisions of the Supreme Court as to what is prohibited by the federal constitution . . ." (App. C, p. 16a).

The District Court, having thus found, then ruled that

> ". . . the stringent judicial remedy of injunctive relief is not required . . ." (App. C, p. 16a)

The District Court simply found a lack of constitutionally impermissible conduct relating to the

guidelines during the past four years, and found no likelihood that any such impermissible conduct would be resumed in the future. Based on such findings, the Court exercised its sound discretion and denied the Petitioners' prayer for injunctive relief as to the guidelines. Such exercise of discretion falls well within the latitude enunciated by this Court in *United States v. W. T. Grant Company*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), and it was only that exercise of discretion by the District Court which was affirmed by the Court of Appeals en banc although it appears obvious from their opinion (concurring in part and dissenting in part) that Judges Gee and Coleman did not find the guidelines to be offensive to the First Amendment proscriptions.

II. The Court Of Appeals Correctly Affirmed The District Court's Holding That Declaratory Judgment Relief Was Not Warranted With Respect To The "Christian Virtue" Statute.

The District Court determined that there existed no actual case or controversy that would give the District Court the minimum constitutional jurisdictional base to provide declaratory relief relative to Section 231.09 (2), Florida Statutes. Specifically, the District Court concluded that there was no evidence presented concerning the present enforcement or the likelihood of future enforcement or application of the Statute which would be adverse to the Petitioners. (App. C, p. 18a).

Based upon Petitioners' failure to show any basis for Petitioners' concern over the wording of the statute, the District Court held that the fears of Petitioners were imaginary and speculative and that there was no real case or controversy between adverse parties that would justify granting even declaratory relief. In essence, the ruling of the District Court is supported by this Court's decision in the cases of *Younger v. Harris*, 41 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971) and *Steffel v. Thompson*, 415 U.S. 452, 39 L.Ed. 2d 505, 94 S.Ct. 1209 (1974).

As stated in *Younger v. Harris, supra*, the Judiciary has the power to declare laws unconstitutional "on its face" or as applied; however, this power is derived from the authority to resolve concrete disputes which have been properly brought before the courts for decision. Noting that a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution, this Court said at 41 U.S. 52:

> "But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them."

In the case sub judice, the Petitioners simply failed to demonstrate that the complained of statute has been or

will be applied in any manner by the Respondents, and the District Court so found. Therefore, the Petitioners failed to meet the burden of demonstrating an actual case or controversy. See also, *Maryland Casualty Company v. Pacific Coal and Oil Company*, 312 U.S. 270, 61 S.Ct. 510 (1941).

The decision of the District Court relative to the statute was not to sanction or approve the wording of said statute. The District Court merely held that the minimum requirements were not present to constitute a case or controversy, and therefore that a declaratory judgment was not warranted. (App. C, p. 18a). Inasmuch as no concrete controversy existed, affecting the legal interests of the parties, the District Court found that it had no jurisdiction to hear the statutory attack. (App. C, p. 19a)

The above-discussed decision of the District Court was the decision affirmed by an equally divided Circuit Court of Appeals (App. F, p. 75a). The decision of the District Court was not predicated on the constitutionality of the statute. Accordingly, the Petitioners have not demonstrated a conflict between the decision of the District Court (as affirmed by the Court of Appeals) with any decision of this Court, nor have the Petitioners shown to this Court that the decision of the District Court was incorrect.

III. The Issues Herein Are Not Important Enough To Warrant This Court's Attention.

A comparison of the issues addressed in the case sub judice with the manyfold complex constitutional issues which regularly confront this Court leads one to the inescapable conclusion that the issues presented by this case simply do not merit this Court's attention. This is true for the following reasons:

1. There is no showing that the Respondents ever enforced or implemented the provisions of the "Christian Virtue" statute. The Petitioners merely desire that a statute which still appears on the books be declared unconstitutional.

2. Although the Respondents in 1970 (more than eight years ago) wrongfully allowed members of the Gideon Society to go into school classrooms and distribute Gideon Bibles up and down the aisles to students, there is no evidence of a reoccurrence thereof in the past eight years, and there is no finding that the religious literature guidelines serve any purpose other than to represent and espouse the Respondents' total and pure neutrality towards all faiths.

3. Succinctly stated, this Court is now asked to survey the statute books and a School

Board's Minutes (resolutions), and to declare portions thereof unconstitutional, which are not shown to have been applied to the Petitioners, a task which simply does not warrant this Court's time or attention.

IV. It Is Unlikely On This Record That This Court Could Reach Any Constitutional Issue.

It is obvious from the opinions of the District Court that the question of the constitutionality of the guidelines and of the "Christian Virtue" statute was never reached or directly addressed by that Court. Having found that there was no constitutionally impermissible conduct under the guidelines for a number of years and no likelihood thereof in the future, and having further found no concrete controversy as to the statute and that it was not being applied to the Petitioners, the District Court did not directly rule on the ultimate question of the constitutionality of the guidelines or the statute. It was not necessary because of the facts of the case to go that far. The case was disposed of on nonconstitutional grounds. And although two of the Circuit Court judges in the Fifth Circuit Court's en banc opinion expressed their strong belief that the guidelines are constitutional, the majority of that Court en banc merely affirmed the District Court's decision.

For those reasons, it would appear unlikely that any constitutional issue could be reached by this Court on the record of this case.

CONCLUSION

Based upon the reasons hereinbefore set forth, the Petition for a Writ of Certiorari sought herein should be denied.

Respectfully Submitted,

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Attorney for Respondents

CERTIFICATE OF SERVICE

I, WILLIAM M. ROWLAND, JR., Attorney for the Respondents in the foregoing BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of December, A.D. 1978, I served three copies of the foregoing BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT on each of the following:

(1) JEROME J. BORNSTEIN
BORNSTEIN & PETREE
125 South Court Avenue
Orlando, Florida 32801

(2) HON. ROBERT SHEVIN
Attorney General
Department of Legal Affairs
725 South Calhoun Street
Tallahassee, Florida 32304

by depositing same in the United States Mail, postage prepaid, and properly addressed.

I further certify that all parties required to be served have been served.

William M. Rowland, Jr.